IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. .

LAZZARO LA GUERRA,

Respondent,

v.

LLOYD BRASILEIRO,

Petitioner.

BRIEF FOR PETITIONER.

The Facts.

The essential facts are stated in the petition.

POINT I.

The decision in the present case is based directly upon the rejection of the rules governing in cases of this kind, as previously laid down by this Circuit Court and as laid down by the courts of other circuits.

The District Court in its opinion upon the trial (R., pp. 197-198) and in its opinion on plaintiff's motion for a new trial (R., pp. 15-21) alluded to

the undisputed facts that the stevedoring company was an independent contractor; that it was the employer of the plaintiff and in sole charge of the job; that no officer of defendant was present or had any part in the unloading (R., pp. 16-17). It then pointed out that there was no defect in the structure or appliances of the vessel (R., p. 16), and that the ship was in a safe condition when turned over to the stevedores (R., p. 18). The Court observed that no condition of danger existed until the stevedores discharged a part of the New York cargo, and that whatever danger then arose was "as a result" of the stevedores removal of part of the New York cargo which supported the Philadelphia cargo (R., p. 18); and further that the accident did not occur until after the stevedore changed the condition of the Philadelphia cargo by a removal of part thereof (R., p. 18). The Court then went on to hold that the condition which brought about the injury was caused by, and arose during the course of, the stevedoring work; that stevedores are engaged for the special skill and experience (R., p. 19) and that the vessel could not be held liable for this condition which was known to plaintiff and his employers, and which it was their, and not defendant's duty, to remedy.

The District Court applied the well established rules:

> 1. That the vessel owner is liable for injury to a stevedore only where it is caused by a defect in the vessel, her structure or appliances; that the vessel's duty to the stevedore and longshoremen is to turn the vessel over to the stevedore and longshoremen in a safe condition and furnish a reasonably safe place to work and reasonably safe access thereto.

2. That it is the stevedore's duty to see that the cargo is discharged in a manner which is safe for its employees.

3. That the duty of the vessel owner in the stowage of cargo is with reference to the safe carriage of the cargo and the stability and trim of the vessel. It is not referable to the safety of professional stevedores and their professional employees engaged to discharge the cargo at the end of the voyage.

Prior to the decision of the Circuit Court in this case these rules were uniformly applied and followed in this, the Second Circuit, and in the various other Circuits in which maritime causes are commonly dealt with.

In its decision in this case this Circuit Court has now completely rejected these long established rules and proceeded upon a new and novel theory, holding that a portion of the ship's cargo (bags of cocoa) is a part of the ship, the same as a wooden or steel bulkhead (R., p. 204).

This decision of the Circuit Court now squarely raises a conflict between decisions in this Circuit and decisions on these facts in other Circuits wherein, as stated, maritime causes are commonly dealt with.

For conflict with the rule of the Fourth Circuit, see *The Beechdene* (Md.), 121 F. 593, which the court below considered and expressly "rejected" (R., p. 205). The rule of that case, established by the District Court in 1899, has not been questioned until the court below expressly "rejected" it. In that case the claimant was employed in the hold of a ship by an independent stevedoring contractor and was

injured by the collapse of a wall of cargo. As to the conditions existing aboard a cargo vessel during the discharge of cargo, and the rules applicable thereto, the Court said:

> "The cement was stowed under hatch No. 4, and extended across the ship; being placed against the bulkhead forward, and next to a shipment of sugar in bags aft, and separated from the sugar by dunnage of boards. The gang of stevedores started to take out the cement about 2 o'clock, and, working rapidly, had discharged nearly to the bottom tiers by 6 o'clock, when the accident occurred. The removal of the cement left a vacant space across the ship about 20 feet in depth between the bulkhead forward and the perpendicular tiers of bags of sugar aft. Unexpectedly to the stevedores who were working on the bottom of this opening, and without warning, the bags of sugar on the port side suddenly slid forward and down on the libelant, and injured him.
>
> * * *
>
> Cargo is stowed with reference to its safe carriage, and the necessity to make it safe for that purpose is the controlling consideration, and not the safety of those who may be employed at the end of the voyage to discharge it. Who are the persons most familiar and experienced in the dangers which attend the business of unloading cargoes? Obviously, the stevedores, and not the officers of the ship.
>
> * * *
>
> The unloading of the cement was delegated to professional stevedores. The officers of the ship

did nothing in the way of directing them as to how the cement was to be taken out, or as to what precaution should be observed to protect those doing it from injury. The stevedores are presumed to know how to do it, and what are the reasonable precautions which must be taken to make it safe to pursue their occupation.

And this was the rule in this, the Second Circuit, prior to the decision in instant case. See *The Belos* (not officially reported), 1939 A. M. C. 324 (decided March 15, 1939).

For conflict with the Circuit Court for the Fifth Circuit see:

Bettis v. *Frederick Leyland & Co., Ltd.* (C. C. A. 5), 153 F. 571 (decided March 12, 1907);

"We need not, however, discuss it, because from the evidence in the case the owners furnished as reasonably safe premises and surroundings for libelant to work in as the nature of the case permitted. The place or premises were only made dangerously unsafe by the negligent handling of the hatch furniture which was entirely under the control of the libelant and his colaborers. They took out enough of the hatch coverings to answer their purpose when they were removing goods from between decks from aft the hatch; and when they changed to removing goods from forward of the hatch they should have taken out the alleged burden piece the subsequent fall of which injured the libelant. For not taking it out, neither the ship nor its owners were in any wise negligent or liable."

Bryant v. *Vestland* (C. C. A. 5), 52 F. (2d) 1078 (decided Oct. 27, 1931);

"The rule is well settled. It was the duty of the officers of the vessel to use reasonable care to furnish the stevedores with reasonably safe appliances to work with. However, they were not charged with the duty of constant inspection of the appliances furnished. If what was initially furnished was reasonably safe and adequate and became defective through use while in charge of the stevedores, it was necessary for knowledge of that fact to be brought home to the officers of the ship before any duty of replacement arose."

Luckenbach S. S. Co. v. *Buzyuski* (C. C. A. 5), 19 F. (2d) 871 (decided June 2, 1927);

"As libelant was an employee of an independent contractor, the relationship of master and servant did not exist between him and the steamship company. However, it owed him the duty of using reasonable care to furnish him with reasonably safe appliances to work with, suitable to the work being done, and of inspecting these appliances before turning them over to the Contracting Company. If thereafter the appliances became defective through use while in charge of the Contracting Company, it was necessary for notice of that fact to be brought him to the Steamship Company to impress it with liability."

And see:

Navigazione Alta Italia v. *Vale* (C. C. A. 5), 221 F. 413 (decided March 8, 1915);

The Prince Rupert City (D. C., Florida), 30 Fed. Supp. 755 (decided Dec. 7, 1939); *The Ellenor* (D. C., Florida), 39 Fed. Supp. 576 (decided May 26, 1941).

For conflict with the rule of the First Circuit see:

Weldon v. *United States, et al.*, 9 Fed. Supp. 347 (decided Nov. 15, 1934);

"While the relationship of master and servant does not exist between the owners of the vessel and a stevedore employed by an independent contractor, nevertheless it is a recognized rule of law that the owners of the vessel, or those in charge, must exercise a reasonable degree of care in providing suitable and safe equipment for the use of the stevedores.

* * *

On the other hand, if the defect was easily discernible, it would logically follow that the rung was bent by being hit as cargo was lowered into the hold while the loading was taking place, between September 26 and October 1. In such an event, the ship's owner would not be liable. It is not the duty of the owner to continually inspect the appliances used while the loading is taking place."

The decision of the Circuit Court is likewise in direct conflict with the Circuit Court of Appeals for the Ninth Circuit:

Grays Harbor Stevedore Co. v. *Fountain* (C. C. A. 9), 5 F. (2d) 385;

"The owner of a vessel owes to stevedores engaged upon the vessel the duty of exercising

reasonable diligence to furnish a reasonably safe place in which to perform their services and a reasonably safe passageway to and from their work and appliances reasonably suited to the purpose for which they are used and such as are customary and usual for ships of that kind, and it is the duty of the shipowner to give such stevedores notice of any latent dangers or defects in the ship or the appliances. These general principles are well established and are not questioned."

The Mercier (D. C., Oregon), 5 Fed. Supp. 511 (decided Dec. 4, 1933);

"The expression 'might with reasonable care have known' implies the duty of inspection upon the part of the ship, which is a well-recognized requirement. *The Rheola, supra.* Without doubt this burden is lifted, on the other hand, when control of the appliances passes to the stevedore. *Bryant* v. *Vestland, supra.* Control carries with it responsibility."

See also:

The Kongosan Maru (C. C. A. 9), 292 F. 801 (decided Oct. 19, 1923).

Ove Tysko v. *Royal Mail* (C. C. A. 9), 81 F. (2d) 960 (decided Feb. 10, 1936).

The decisions of these Circuit Courts, the First, Fourth, Fifth and Ninth Circuits, although previously in accord, are now in direct conflict with the decision in this case by this, the Second Circuit.

POINT II.

The decision in this case seriously prejudices the uniformity of the general maritime law. It radically alters the duties of vessel owners as they heretofore existed. It makes the vessel owner an insurer of the safety of stevedores. It presents a matter of high national interest because it imposes on vessel owners such a great degree of care that the work of loading and discharging vessels will be hindered and delayed at a time when the vital needs of war shipping require such work to proceed with all possible dispatch.

The decision in this case seriously prejudices the uniformity of the general maritime law. Stevedores and longshoremen are as clearly identified with maritime affairs as the mariners themselves. They are consequently governed by the general maritime law. In the case of *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, this Court said:

> "The libelant was injured on a ship, lying in navigable waters, and while he was engaged in the performance of a maritime service. We entertain no doubt that the service in loading and stowing a ship's cargo is of this character. Upon its proper performance depend in large measure the safe carrying of the cargo and the safety of the ship itself; and it is a service absolutely necessary to enable the ship to discharge its maritime duty. Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class 'as clearly identified with maritime affairs as are the mariners.'"

Further the decision in this case seriously prejudices the rights of vessel owners by radically changing the measure of their duties to independent professional stevedores engaged to load or discharge vessels. At the present time when the great increase in shipping resulting from our war effort requires the speedy loading and discharge of vessels, the settled rules of vessel owners' liability should be adhered to. The decision of the Circuit Court fundamentally affects the long established rules for the determination of controversies of this kind.

Under the decision of the Circuit Court a vessel owner may no longer rely upon the skill and experience of professional stevedores. He is made an insurer of their safety since the very cargo which they are discharging is, *for the first time*, held to be a part of the vessel itself. A stevedore or longshoreman who voluntarily exposes himself to a known danger, may under the rule established by the court below, hold the vessel liable because the cargo which injures him is a part of the ship; and under the heretofore existing rule (see cases cited on pp. 14-18, *supra*) the stevedore could always recover for injury caused by a defect in the ship's structure.

The effect of the present decision, therefore, is that under the conditions of a great national emergency with an acute shortage of vessels and tonnage, where every vessel must operate at maximum speed and efficiency, the vessel operator is forbidden to rely upon the skill and experience of independent contracting stevedores and longshoremen. In order to avoid liability to experienced stevedores he, himself, must first go into the hold of the vessel; and if there is any ill stowage *he* must restow it, lest he be held liable to skilled and experienced independent con-

tracting stevedores. It is not enough, the court below holds, that the stevedores receive actual knowledge of the condition, and even attempt as a part of their paid duty to rectify it. The vessel owner is an insurer against all possible hazards. It is immediately obvious that the imposition of this duty will gravely retard the progress of the work of loading and discharging vessels. Vessel owners have not heretofore been under such an onerous duty, and the present, we respectfully submit, is not the time to place upon them a duty of care which cannot but hinder, delay and retard the loading and discharge of vessels which are so vitally needed in the successful prosecution of a war.

CONCLUSION.

Because the decision of the Circuit Court of Appeals is in direct conflict with the decisions in the First, Fourth, Fifth and Ninth Circuits; because the decision is on an important principle of maritime law of wide application; because the necessity of uniformity among the Circuits in the maritime law as administered by them should be definitely and finally established in matters of this kind; and because the decision below will seriously prejudice and delay the work of loading and discharging vessels at a time when the efficient use of every available vessel is a matter of the highest national interest, it is respectfully submitted that a Writ of Certiorari should be granted.

Dated, March 2, 1942.

Respectfully submitted,

OSCAR R. HOUSTON,
Counsel for Petitioner.